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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 J & J SPORTS PRODUCTIONS, Inc.,
12 Plaintiff,
13 vs.
14 EMILIA CARVAJAL PEREZ, et al.,
15 Defendants.

CASE NO. 09cv1381 WQH (CAB)
ORDER

HAYES, Judge:

16 The matters before the Court are the Motion for Default Judgment (Doc. # 10) filed by
17 Plaintiff J & J Sports Productions Inc. (“J & J Sports”) and the Amended Motion to Set Aside
18 Default (Doc. # 21) filed by Defendants Emilia Carvajal Perez and Jose Alfredo Perez.

19 **BACKGROUND**

20 On June 25, 2009, J& J Sports initiated this action by filing a complaint. (Doc. # 1).
21 The complaint alleges Defendants own a restaurant called Mariscos Ensenada located in
22 Oceanside, California. *Id.* at 3. The complaint alleges J & J Sports held exclusive nationwide
23 commercial distribution rights to “Lethal Combination: Manny Pacquiao v. David Diaz WBC
24 Lightweight Championship Fight Program” (“the Program”) broadcast on June 28, 2008. *Id.*
25 The complaint alleges that Defendants’ restaurant unlawfully intercepted the broadcast and
26 showed the Program to customers. *Id.* at 4. The complaint alleges the unauthorized screening
27 of the Program was intentional and done for commercial advantage and financial gain. *Id.* The
28 complaint alleges claims for: (1) violation of 47 U.S.C. § 605; (2) violation of 47 U.S.C. § 553;

(3) conversion; and (4) violation of California Business & Professions Code § 17200, et seq. *Id.* at 4-8. The complaint seeks injunctive relief, \$170,000 in statutory damages, exemplary damages, punitive damages, restitution, compensatory damages, attorneys' fees, and costs. *Id.* at 9-10.

On June 25, 2009, the Clerk of the Court issued a summons to Defendants. (Doc. # 2). On July 21, 2009, the summons was returned executed. (Docs. # 4, 5). An answer was due by August 3, 2009. *Id.* No answer was filed. On August 4, 2009, J & J Sports requested entry of Clerk Default against Jose Perez. (Doc. # 6). On August 5, 2009, the Clerk of the Court entered default against Jose Perez. (Doc. # 7). On August 18, 2009, J & J Sports requested entry of Clerk Default against Emilia Perez. (Doc. # 8). On August 19, 2009, the Clerk of the Court entered Default against Emilia Perez. (Doc. # 9). On October 8, 2009, J & J Sports moved for default judgment. (Doc. # 10).

On November 6, 2009, Defendants filed a Motion to Set Aside Clerk's Default. (Doc. # 20). On November 16, 2009, Defendants filed their Amended Motion to Set Aside Clerk's Default. (Doc. # 21). On December 4, 2009, J & J Sports filed an amended proof of service and a second amended proof of service. (Docs. 22, 23).

ANALYSIS

I. Amended Motion to Set Aside Clerk's Default

A. Contentions of the Parties

Defendants contend that they were not aware of the pending lawsuit until mid-October of 2009, when they immediately sought legal counsel. (Doc. # 21-1 at 2). Defendants contend that the service of process was defective and that they were not actually served. *Id.* Defendants contend that the proof of service as to Jose Perez states he was served at the restaurant on Monday July 13, 2009, at 10:35 AM, but he only works from about 7 AM to 8 AM on Mondays because Defendants are semi-retired. *Id.* Defendants contend the proof of service as to Emilia Perez is internally inconsistent as to where and how she was served, casting doubt on its validity. *Id.* Defendants contend that they also failed to receive a mailed copy of the lawsuit due to negligent mail handling at the restaurant. *Id.*

1 Defendants contend that they have a meritorious defense to the allegations of the
 2 complaint. *Id.* at 8. Defendants contend that they subscribe to a Mexican satellite television
 3 network called “Sky TV Mexico,” which broadcasts Mexican television programs in the
 4 United States. *Id.* Defendants contend that the Program was broadcast on Sky TV Mexico
 5 and shown in their restaurant by simply turning on the television and selecting that channel.
 6 *Id.* Defendants contend that there will be no prejudice to J & J Sports if the default is set
 7 aside. *Id.* at 9. Defendants attached the sworn declarations of Emilia Perez, Jose Perez, and
 8 their attorney, Sergio Feria, in support of their motion as well as their proposed answer to the
 9 complaint. (Docs. # 21-2, 21-3, 21-4, and 21-5).

10 J & J Sports contends that Defendants have failed to show good cause for setting aside
 11 the Clerk’s Default. (Doc. # 24 at 3-4). J & J Sports contends Defendants’ statements do not
 12 show that they were not properly served and that at most, they are able to show “technical
 13 discrepancies” in the proof of service as to Emilia Perez. *Id.* at 5. J & J Sports contends that
 14 Defendants defense to the allegations in the complaint is not meritorious because even if
 15 Defendants did receive the broadcast from Sky TV Mexico, showing it in the restaurant would
 16 violate J & J Sports’s licensing rights. *Id.* at 7. J & J Sports further contends that it would be
 17 prejudiced if the default were set aside because “Defendants are intimately intertwined”
 18 resulting in “a possibility of fraud or collusion” and because “Defendants admittedly to having
 19 [sic] little to do with the day to day operations of the business there is a likelihood of loss of
 20 evidence.” *Id.* at 9. Finally, J & J sports contends that “even if Defendants were not properly
 21 served, Defendants have not presented a meritorious defense to liability in this case and setting
 22 aside the default would be a waste of judicial time and resources.”

23 **B. Applicable Law**

24 Pursuant to Federal Rule of Civil Procedure 55(c), “[t]he court may set aside an entry
 25 of default for good cause.” A party moving to set aside a clerk’s default has a lower burden
 26 than a party moving to set aside default judgment. “Any of the reasons sufficient to justify the
 27 vacation of a default judgment under Rule 60(b) normally will justify relief from a default
 28 entry and in various situations a default entry may be set aside for reasons that would not be

1 enough to open a default judgment.” Charles Alan Wright, Arthur R. Miller, and Mary Kay
 2 Kane, 10A Federal Practice and Procedure § 2696 (3d ed. 1998). Pursuant to Federal Rule of
 3 Civil Procedure 60(b)(1), a court may set aside a judgment “for the following reasons: mistake,
 4 inadvertence, surprise, or excusable neglect.” The grounds listed in Rule 60(b) “are liberally
 5 interpreted when used on a motion for relief from an entry of default.” *Hawaii Carpenters’*
 6 *Trust Funds v. Stone*, 749 F.2d 508, 513 (9th Cir. 1986). “The different treatment of default
 7 entry and judgment by Rule 55(c) frees a court considering a motion to set aside a default entry
 8 from the restraint of Rule 60(b) and entrusts determination to the discretion of the court.” *Id.*
 9 A district court is “free to deny the motion ‘if any of the three factors’” identified by the Ninth
 10 Circuit in *American Association of Naturopathic Physicians v. Hayhurst* favor denial: “(1)
 11 whether [Defendants] engaged in culpable conduct that led to the default; (2) whether
 12 [Defendants] had a meritorious defense; or (3) whether reopening the default judgment would
 13 prejudice [Plaintiff.]” *Franchise Holding II, LLC v. Huntington Rest.’s Group*, 375 F.3d 922,
 14 926 (9th Cir. 2004) (citing *American Ass’n of Naturopathic Physicians v. Hayhurst*, 227 F.3d
 15 1104, 1109 (9th Cir. 2000)).

16 **C. Ruling of the Court**

17 Defendants have both sworn that they were not served and that they did not receive
 18 notice of the lawsuit until mid-October of 2009. (Docs. # 21-2, 21-3). The defects in the proof
 19 of service submitted as to Emilia Perez support her assertion that she never received service.
 20 (Docs. # 5, 22, 23). The three proofs of service filed in this case are internally contradictory
 21 and inconsistent with each other. The original proof of service states that Emilia Perez was
 22 served at 1405 South El Camio Real, Suite 108B, Oceanside, California 92054, the address for
 23 the restaurant. (Doc. # 5 at 1). The proof of service also states that the server was unable to
 24 contact Emilia Perez at her residence because she was “not home.” *Id.* at 2. The proof of
 25 service states service was attempted four times at the residence before “substituted service”
 26 was performed at the residence. The manner of service is “substitute service” via serving a
 27 “John Doe” co-occupant who refused to give his name. *Id.* at 1. The co-occupant of the
 28 residence is described as approximately 30 years old, weighs 180 pounds, and is Hispanic. *Id.*

1 at 1. However, the same form states “Residence address was not known at the time of
2 service.” *Id.* at 2. The “Amended” proof of service filed December 4, 2009, states that service
3 was accomplished at Emilia Perez’s residence by serving the same “John Doe” who is listed
4 as a “co-occupant.” (Doc. # 22 at 1-2). This proof of service lists the restaurant’s address as
5 the residence address and states “Business address was not known at the time of service.” *Id.*
6 at 2. Finally, the “Second Amended” proof of service filed December 4, 2009, states that
7 Emilia Perez was served at her business address, that the residential address was not known,
8 and lists the same “John Doe” not as a “co-occupant” but as the “Person in charge.” (Doc. #
9 23). Defendants have come forward with credible evidence that they were unaware of the
10 lawsuit. The Court finds that Defendants did not engage in any “culpable conduct” that
11 resulted in their default.

12 Defendants stated that they subscribe to a satellite television service from Mexico which
13 broadcast the Program and have provided bills from that service to support their claim. (Docs.
14 21-2, Ex. 1, 21-3, Ex. 1). Such evidence is relevant to establish whether showing the Program
15 was unauthorized pursuant to 47 U.S.C. § 605 and 47 U.S.C. § 553; whether it was “unlawful,
16 unfair or fraudulent” pursuant to California Business & Professional Code § 17200; and
17 whether it was “wrongful” under California tort law on conversions. Even if J & J Sports is
18 correct that purchasing a satellite broadcast of the Program from another provider within the
19 United States would still be a violation of 47 U.S.C. § 605 and 47 U.S.C. § 553, this evidence
20 would be relevant to damages. A “willful” violation of 47 U.S.C. § 605 for “the purposes of
21 direct or indirect commercial advantage” allows the court to increase the damage award by up
22 to \$100,000 over the damages for an unintentional violation. If a defendant who violates 47
23 U.S.C. § 553 can establish that he was “not aware and had no reason to be aware that his acts
24 constituted a violation of this section, the court in its discretion may reduce the award of
25 damages, whether actual or statutory, to a sum of not less than \$100.” Defendants’ evidence
26 would help to establish that if there was a violation, it was not willful, and that they had no
27 reason to be aware of any statutory violation. The Court therefore finds that Defendants have
28 a meritorious defense to the allegations of the complaint.

J & J Sports contends it has expended time and money in pursuing its claim and there will be financial loss if the default is set aside. *Id.* The expense of prosecuting a lawsuit is not the sort of unfair prejudice that the rule from *American Association of Naturopathic Physicians v. Hayhurst* is designed to protect against. J & J Sports would have had to bear the expense of proceeding with the lawsuit if Defendants had timely filed an answer. Defendants filed their motion approximately three months after the clerk's defaults were entered and less than a month after J & J Sports moved for default judgment. *See* Docs. # 9, 10, 12. There is no evidence that this three-month delay will make it any more difficult for J & J Sports to prove its case. Defendants have therefore shown that J & J Sports will not be subject to prejudice if the default is set aside. The Court finds that Defendants have established good cause to set aside the entry of default against them.

II. Motion for Default Judgment

J & J Sports contends that it is entitled to default judgment because its complaint pleads all of the elements of the alleged claims and Defendants failed to file an answer or other responsive pleading on the properly served complaint. (Doc. # 10-1 at 2). Because the Court has granted Defendants' motion to set aside the entry of default, J & J Sports's motion is moot.

CONCLUSION

IT IS HEREBY ORDERED that Defendants' Amended Motion to Set Aside Default (Doc. # 21) is **GRANTED**. Defendants may file the answer attached to their motion. IT IS FURTHER ORDERED that Plaintiff's Motion for Default Judgment (Doc. # 10) is **DENIED AS MOOT**.

DATED: January 20, 2010



WILLIAM Q. HAYES
United States District Judge